

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2158 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?  
1 to 5 No
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MANILAL SOMABHAI VARIA

Versus

STATE OF GUJARAT

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Appearance:

MR AKSHAY H MEHTA for Petitioner

MR DA BAMBHANIA, AGP for Respondents

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CORAM : MR.JUSTICE S.D.SHAH

Date of decision: 24/06/97

ORAL JUDGEMENT

1. The petitioner who was working as a Head Wireless Operator was charged with the allegations that during the period between 1966-67 to 1977 he had misappropriated various amounts in the vicinity of Rs. 42,000/-. A criminal complaint was also filed with the police of Raopura Police Station at Baroda on 15th March, 1978 against the petitioner alleging that he had while in the Accounts Department of his unit defalcated various amounts. The police commenced the investigation and

criminal cases were filed against the petitioner in the court of Chief Judicial Magistrate on 25th March, 1979. At the end of investigation, chargesheets were also filed in respect of various amounts alleged to have been misappropriated by the petitioner at different periods on 25th February, 1980. Petitioner was placed under suspension by the Department by its letter dated 7th January, 1978 which is produced at Annexure-A on the ground that he was involved in embezzlement of government money and, therefore, pending enquiry and prosecution, if any, he was placed under suspension vide order dated 7th January, 1978. The order stipulated that for a period of first six months of his suspension, he will get the subsistence allowance of the amount equal to leave salary and dearness allowance which he would have drawn. It was further stipulated that his subsistence allowance will be increased by suitable amount not exceeding 50% of the said allowance if the suspension is prolonged beyond six months. It was also stipulated that it will not be permissible for the petitioner to do any private business or to accept any private employment while under suspension.

3. It appears that criminal cases were filed being Criminal Cases No. 279 of 1980 and 383 of 1982 to 389 of 1982 for the offences punishable under Section 420, 409, 465, 471 and 477 of I.P. Code. On behalf of the department/ prosecution, one witness was examined on 15th of April, 1982 and 10th August, 1982 and lastly on 4th of January, 1983. The examination-in-chief of the said witness remained incomplete and since the said witness thereafter did not turn up and no further sufficient evidence was led by the prosecution, petitioner came to be acquitted on 16th June, 1983.

4. It appears that the State of Gujarat preferred Appeal being Criminal Appeal No. 848 of 1983 to 855 of 1983 before the Hon'ble High Court and by common judgment dated 24th February 1984 the appeals were allowed with direction to the criminal court to complete the cases within stipulated time. The papers were sent back to the criminal court and petitioner filed application before the learned Magistrate to pass proper order as the prosecution has failed to produce any further evidence within the time stipulated by the Hon'ble High Court. Such application dated 17th of October, 1984 came to be rejected and petitioner thereupon preferred Criminal Revision Application No. 31 of 1985 before the High Court. The said criminal revision application was disposed of by the High Court of Gujarat with direction to the learned Magistrate to complete the trial along

with the judgment within two months i.e. by 15th of October, 1985. Even after second remand to the court of Magistrate, no progress was made and prosecution did not produce any further evidence nor did it complete the incomplete examination-in-chief of the witness and, therefore, Magistrate acquitted the petitioner of the charges levelled against him on 23rd of April, 1986.

5. It is pertinent to note that the state did not prefer any appeal against the order of acquittal and petitioner was reinstated in service by order dated 13th October, 1986. Petitioner thereupon represented that period spent by him under suspension be regularised and he be treated as on duty and the difference of subsistence allowance and actual salary payable to him be paid to him.

6. It appears that no decision was taken by the department in respect of the period of suspension for almost two years thereafter and, therefore, the petitioner has no other alternative but to file the present petition on 30th April, 1988.

7. It will not be out of place to notice at this stage that the Chief Judicial Magistrate, Vadodara, in the aforesaid criminal cases found that only one witness Vijaysinh Laxmansinh was examined for and behalf of the prosecution and that his examination-in-chief was recorded on different dates which was left incomplete. Despite various opportunities granted, the witness did not turn up for further examination-in-chief and cross examination and even after the directions issued by the Hon'ble High Court on two occasions the prosecution has failed to produce the said witness and other evidence to bring home the charges against the accused. Number of adjournments were granted to the prosecution to produce the witness and other witnesses for bringing home the charges and even direction was given to supply full address of the witnesses so that witnesses summons could be issued and witnesses be examined. It was also found that most of the witnesses were the witnesses residing and serving at Vadodara and yet no attempt was made by the prosecution or the department to serve the summons on the witnesses. Even witness summons was issued to PSI which is also returned as unserved and despite granting of number of adjournments, no sincere attempt was made to effect service of summons on PSI. Even after remand from High Court on two occasions, all opportunities were given to the prosecution to lead and complete the evidence within the stipulated time, but, no attempt was made to produce the witnesses for bringing home the charge and,

therefore, judicial magistrate was pleased to acquit the petitioner accused of the charges levelled against him by judgment and order dated 23rd April, 1986.

8. It appears that thereafter the competent authority, namely, Commandant, State Reserve Police, Group-I, Vadodara, passed the order dated 30th October, 1986 at Annexure-C, inter alia, reciting that the petitioner was acquitted by the Court of Chief Magistrate, Vadodara, and therefore it is directed that the petitioner be reinstated in service from the date of the receipt of the said order. The question as to how the period of suspension should be treated was not decided. Thereafter, by order dated 29th July 1987, the Commandant, State Reserve Police Force, Group-I, Vadodara directed that the question of starting departmental proceeding against the petitioner was under consideration and, therefore, question of treating his period of suspension shall be decided only after departmental enquiry.

9. It appears that the petitioner thereafter made a representation to the competent authority on 4th of November, 1986 to decide the question of his suspension and to pay him the full salary for the period of suspension as he was acquitted by the competent criminal court and he was already reinstated in service. It was the case of the petitioner that he was honorably acquitted and that benefit of doubt was not given to him. Secondly it was the case that despite his application to decide the question of paying him the full salary and to treat the period of suspension as on duty, no order was passed by the competent authority for a period of more than two years and ultimately the petitioner was constrained to file the present petition. The request of the petitioner to treat the period of his suspension as such was not considered on the ground that the departmental proceedings were contemplated against the petitioner. It appears that thereafter by order of the court dated 5th August 1988, the department was only allowed to serve the chargesheet on the petitioner.

10. In the present petition, it is, inter alia, prayed by the petitioner that the period of his suspension should be treated as on duty and the difference between the subsistence allowance and his remuneration payable to him be paid with interest and secondly he has prayed that since unreasonably long period has expired after alleged misconducts, no useful purpose will be served and the department should not be permitted to hold the departmental enquiry.

11. It may be noted that petitioner was reinstated in service vide order dated 30th October, 1986 and he has thereafter retired from service on reaching the superannuation age. The request of the petitioner that the period of his suspension be treated as such and he be paid the difference between the subsistence allowance and the salary already payable to him was negatived by order dated 9th of July, 1987 on the ground that the departmental proceedings were contemplated against him. The petitioner thereafter time and again reminded the authorities to pass appropriate order about the period of his suspension. It appears that no chargesheet was also served on the petitioner and against the judgment of acquittal rendered by the criminal court, the State Government has decided not to prefer appeal. The petitioner was to retire in 1988 and he has already retired in 1988.

12. In the aforesaid fact situation, this court is called upon first to decide as to whether the petitioner should be paid the full salary of the period for which he remained in suspension i.e. the period starting from 7th January, 1978 to the date of his reinstatement i.e. 30th of October 1986. It shall have to be noted that it is because of the failure of the prosecution/department to produce the evidence that the charge was not brought home in the criminal proceedings despite the order of remand passed by the High Court and despite extension of time, the department failed to produce the evidence and, therefore, the petitioner was acquitted in absence of any substantial evidence to bring home the charges levelled against him. In substance, this would amount to an honourable acquittal because no evidence worth its name was produced. When the prosecution has failed to produce the evidence and has not established the charges levelled against the employee in a criminal proceeding, it cannot be said that the acquittal of the employee is on some technical grounds. But, it shall have to be treated as honourable acquittal because there was want of evidence to bring home the charges levelled against the employee. Existence of no evidence or failure to produce sufficient evidence ultimately leads to the acquittal of the accused person and the department, in the present case being State Reserve Police Force was well aware of the situation that if no evidence is produced, the employee/accused was liable to be acquitted. Such acquittal should be treated as honourable acquittal and ordinarily the employee should be treated as entitled to full salary including all allowances and benefits flowing from continuance in service and the petitioner cannot be

denied the difference between the subsistence allowance paid to him and the actual salary with all other perquisites payable to him. Before withholding such perquisites and actual allowances payable to him, the rules of natural justice were required to be followed which were also not followed and, therefore, the petitioner is entitled to succeed in his first relief insofar as the difference between the subsistence allowance already paid to him and the actual salary along with all perquisites payable to him is not paid to him by the government. It is accordingly, therefore, directed that the respondent shall pay to the petitioner the difference between the subsistence allowance paid to the petitioner from the date of his suspension and the actual salary along with all other allowances payable to him within a period of three months from today.

12. However, at the same time, it shall have to be kept in mind that the Apex Court of this country has also invoked and applied in appropriate cases the principle of "no work no pay". In the present case, admittedly, the petitioner has not worked because of the order of suspension from the date of suspension till he is reinstated. He was ready and willing to work but he was not permitted to work. The fact remains that he has not worked. Therefore, in order to safeguard the interest of government revenue, and keeping in mind the fact that the charges are of defalcation, it is directed that out of the amount payable to the petitioner, amount of Rs. 21,000/- (Rupees twenty one thousand only) be deducted as the charge against the petitioner is that he has defalcated within the period of 10 years amount of Rs. 42,000/-. This direction is given in the special facts and circumstances of this case and not by way of precedent and solely with a view to safeguard the revenue interest of the government.

13. Next question is now as to whether the department should be permitted to hold departmental enquiry into the charges which are spread over a period of ten years i.e. the period between 1966 - 67 to 1977-78. That period itself is of ten years, for which no documentary evidence would now be available. Secondly, no witness would be available as is found even during the criminal trial. Thirdly, even if witnesses are traced, in absence of documentary evidence, it will be difficult to bring home the charge against the petitioner. Justice Hon'ble M.P. Thakker (as His Lordship then was) has already taken the view that enquiry by department into stale incidents, where no documentary evidence would be available and where government witnesses have already retired from

service after a lapse of unreasonably long period, should not be permitted. In the present case, for the charges between 1966 - 67 and 1977 - 78, now to permit the department to hold departmental enquiry would be subjecting the petitioner to mental torture and it would not serve any useful purpose because even otherwise he is acquitted by the criminal court on the very charges. In that view of the matter, the respondents are restrained from holding any departmental enquiry against the petitioner into the charges levelled against him.

14. In the result, the petition succeeds. The respondents are directed to pay to the petitioner the difference between the amount of subsistence allowance already paid to him and the actual salary with all perquisites payable to him minus the amount of Rs. 21,000/- and they are further directed not to hold any departmental enquiry on the charges against the petitioner. Petition thus partially succeeds. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

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